No. 22242

IN THE

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT LEE SIMS,

Petitioner,

vs.

FRANK A. EYMAN,
Superintendent of Arizona
State Penitentiary,

Respondent.

APPELLEE'S ANSWERING BRIEF

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Phoenix, Arizona

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I

APPELLEE'S ARGUMENT ON THE QUESTION WHETHER WHERE THE JURY HAS THE POWER TO ASSESS THE DEATH PENALTY IN A CAPITAL CASE AND DOES NOT HEAR EVIDENCE IN MITIGATION OF PUNISHMENT, THERE IS A DENIAL OF EQUAL PROTECTION OR OF DUE PROCESS

Appellant's argument on the question presented is persuasive of the proposition that the law ought to be amended so that evidence in mitigation of punishment might be presented to a jury. His argument, however, falls far short of establishing that Arizona's procedure denies him equal protection or due process. Applicant is in the wrong forum. The relief he seeks should be sought from the legislature of Arizona or from the Arizona judiciary in the exercise of its rule-making power.

Appellant questions the propriety of a trial in which a jury passes on the question

of guilt and the question of penalty. In Pope v. U.S., 372 F.2d 710, 370, the court stated:

> "Our conclusion is fortified by the supreme court's very recent remarks in Spencer v. State of Texas, 385 U.S. ___, 87 S.Ct. 648, 17 L.Ed.2d ___ (1967) about two-stage jury trial procedure. There, Mr. Justice Harlan, author of the principal opinion, said, 'Two-part jury trials are rare in our jurisprudence; they have never been compelled by this Court as a matter of constitutional law, or even as a matter of federal procedure.' "

(Spencer v. Texas is found at 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606.)

The legislature of Arizona has determined that the choice of penalty in first degree murder shall be on the basis of an attempt to make the punishment fit the crime, rather than the criminal. It has decreed that the determination is to be based on the facts admissible to prove the crime itself and the circumstances surrounding it, rather

than the facts of the defendant's history and personality. Nothing in our constitution prohibits such a decree, however much modern penology may inveigh against the wisdom of the decree.

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II

APPELLEE'S ARGUMENT ON THE QUESTION WHETHER THE DUE PROCESS CLAUSE IS VIOLATED BY THE EXCLUSION OF JURORS BECAUSE OF THEIR OPPOSITION TO THE DEATH PENALTY

The trial court excused certain jurors. (See Exhibit A attached to appellant's application for writ of habeas corpus herein.) They were not excused "because of their opposition to the death penalty". They were excused because they indicated that under no circumstances would they bring in a verdict of guilty with a recommendation of the death penalty.

The question here is not whether a person should be excused from a jury because he disapproves of capital punishment, but whether he should be excused for cause if in no case he could return a verdict of death. State v. Narten, 99 Ariz. 116, 407 P.2d 81.

The people of the State of Arizona, by initiative measure, Laws of Arizona, 1919, Initiative and Referendum Measures, pp. 17, 18, 20, re-instituted the death penalty in Arizona for first degree murder, 5 A.R.S. 193, § 13-453. Assuming that the death penalty itself is proper, (infra, Argument IV, p. 12) the state is entitled to a juror who can, in the proper case, inflict that proper punishment, just as the defendant is entitled to a juror who, in the proper case can vote to acquit. The state as well as the defendant is entitled to an impartial jury, and a juror who could not find for the state on a given issue, regardless of the evidence which might be presented, would simply not be an impartial juror. Reynolds v. United States, 98 U.S. 145 (8 Otto. 145).

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III

APPELLEE'S ARGUMENT ON THE QUESTION WHETHER A STATE PROSECUTION MAY BE INITIATED BY INDICTMENT RATHER THAN BY INFORMATION

Appellant claims that there is a trend in the direction of holding that rights guaranteed by the first ten amendments are secured to the citizen from violation by the states by virtue of the Fourteenth Amendment; and that this Court should find, in anticipation of such finding by the United States Supreme Court, that prosecution by preliminary hearing is a violation of due process.

Article 2, § 30 of the Constitution of the State of Arizona provides as follows:

> "No person shall be prosecuted criminally in any court of record for felony or misdemeanor, otherwise than by information or indictment; no person shall be prosecuted for felony by information without having had a preliminary examination before a magistrate or having waived such preliminary examination."

This constitutional provision is implemented by Rule 78, Rules of Criminal Procedure, 17 A.R.S. 192, which provides as follows:

> "A. Every felony and every misdemeanor of which the superior court has original jurisdiction shall be prosecuted by indictment or information, and every misdemeanor may be prosecuted by indictment or information." (Emphasis supplied)

The United States Supreme Court in holding that prosecution by information is constitutional the Court used this language in Hurtado v. California, 110 U.S. 516:

> "Tried by these principles we are unable to say that the substitution for a presentment or indictment by a grand jury of the proceeding by information, after examination and commitment by a magistrate, certifying to the probable guilt of the defendant, with the right on his part to the aid of counsel, and to the cross-examination of the witnesses produced for the prosecution, is not due process of law."

Maxwell v. Dow, 176 U.S. 581, used this language:

> "The objection that the proceeding by information does not amount to due process of law has been heretofore overruled, and must be regarded as settled by the case of Hurtado v. California,

110 U.S. 516. The case has since been frequently approved. Hallinger v. Davis, 146 U.S. 314, 322; McNulty v. California, 149 U.S. 645; Hodgson v. Vermont, 168 U.S. 262, 272; Holden v. Hardy, 169 U.S. 366, 384; Brown v. New Jersey, 175 U.S. 172, 176."

The Missouri case of State v. Waller, 382 S.W.2d 668, involved a murder prosecution by information which was affirmed. The Court said:

"Finally, appellant's claim that he could have been charged with a capital offense only by an indictment, and not by an information is obviously without merit . . . The requirement of the Fifth Amendment to the Constitution of the United States has no application to state procedure in this regard. Hurtado v. California, 110 U.S. 561, 534, 4 S.Ct. 111, 28 L.Ed. 232; State v. Cooper, Mo. Sup. 344 S.W.2d 72 (1-3)."

See also, Horner v. State, 168 So.2d 137 (Fla.).

There is a strong trend in the decisions of the Supreme Court toward preserving to the citizen substantial rights from which he may

benefit. It is not a trend toward the preservation of ancient forms, where newer forms have bestowed substantial benefit upon the citizen charged with crime.

Rule 16, Rules of Criminal Procedure, 17 A.R.S. 94, provides that a defendant brought before a magistrate after arrest on a felony charge, has a right to an immediate preliminary examination in order to determine whether or not there is probable cause to believe the defendant is guilty of any offense.

The defendant has a right to have counsel present at such examination. (Rules 16, 18, 19) He has the right to have witnesses summoned, to have their testimony heard, and to have them sequestered. (Rules 22, 26, 27) All witnesses shall be examined in the presence of the defendant and may be cross-examined. (Rule 23) The defendant may make a statement concerning the charges against him, and may answer the

charge and explain the facts appearing against him. (Rule 24) He may order a transcript of the entire proceedings. (Rule 28)

If the Rules of Criminal Procedure are not followed, or if the evidence is not sufficient to support a finding of probable cause, relief is available by habeas corpus and motion to quash. State ex rel Corbin v. Superior Court, In and For the County of Maricopa, 357 P.2d 144 (1966), 100 Ariz. 236, 413 P.2d 264, opinion modified on rehearing 100 Ariz. 362, 414 P.2d 738. Defense counsel usually ask for and obtain a preliminary hearing for the purpose of learning the nature of the prosecutor's case. State v. Essman, (1965) 98 Ariz. 228, 403 P.2d 540, at 542.

Grand jury proceedings are secret. The defendant has no right to be present; his counsel may not be present; defendant may not

have witnesses present, nor cross-examine the witnesses against him. There is even no absolute right to a transcript of the proceedings. The preliminary hearing, rather than violating the standard of due process, has raised a new standard of fairness to the accused and has placed new burdens on the prosecution and new protection around the rights of the accused. It is significant that neither this, nor any other defendant, has objected to prosecution by information before the time of the trial. If any incursion on his rights were involved, he waived his right to complain thereof when he enjoyed the benefits of the preliminary hearing.

ARGUMENT

IV

APPELLEE'S ARGUMENT ON THE QUESTION WHETHER THE DEATH PENALTY IS UNCONSTITUTIONAL AS VIOLATIVE OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Appellant makes a cogent argument for the proposition that the death penalty is unwise, immoral, ineffective and unpopular; but he fails to reach the question of its cruelty, unusualness and unconstitutionality.

Mr. Jeremy Bentham, in his Rationale of Judicial Evidence Specially Applied to English Practice, London, Hunt & Clarke, 1827, 5 Volumes, admonishes judges and legislatures to refrain from formulating unbending rules, imposing on the trier of fact the obligation of reaching certain conclusions from certain evidence. He is willing to allow, however, that where the mischief of the decision, if erroneous, is irreparable, there is some prospect that such unbending

rules might, on the whole, prove beneficial.

He says:

> "The other case comprehends in its whole extent the range of capital punishment: the only species of punishment which is absolutely and totally irreparable. But, of the consideration of this irreparability, what is the true result? The impropriety of this mode of punishment: not the propriety of those unbending rules.
>
> In the instance in question, it was the consideration of the nature of the punishment--of the property thus belonging to it--that called into action the humane temerity of the judge. In every system of law into which this irreparable mode of punishment has been admitted,--but most of all in the English system, in which the fondness shewn to it is so great, and so continually upon the increase,--the system of procedure in general, and of the law of evidence in particular, teems with rules and practices tending to the encouragement of criminality in every shape, and most of all in such as are most mischievous. Capital punishment has thus been all along operating, and will continue to operate with continually increasing force, as a slow poison upon the whole system of procedure, including that of evidence. Thus it is that the work of real inhumanity and of false humanity,

> of folly under that specious name, go on together: and, while substantive law, with its favourite and unwearied instrument, capital punishment, is straining every nerve to tighten the bands of society,--adjective law, with its prejudices and inconsistencies, is as pertinaciously employed in loosening them."

From the earliest days of our republic the wisdom of the irreparable mode of punishment has been in question, but the Constitution does not proscribe folly, it proscribes cruelty and unusualness.

When appellant asserts that "our society has progressed to the point where our standards of decency which are the measure of the Eighth Amendment deny that the state has any inherent right to impose punishment which either exceeds or cannot achieve the legitimate objectives of punishment", he, by far, over-estimates American standards of decency.

In the interests of our convenience and saving of time, we tolerate the violent

deaths of thousands in traffic accidents. In the pursuit of amusement to while away the leisure gained at such cost, millions of viewers watch thousands of hours of indecently violent behavior. In the pursuit of undefined, and undefinable, goals, we applaud the violent destruction of our "enemies".

If there is such a trend toward decency, it is for the legislatures to measure the trend. It is for the legislatures to act for society in making its standards of decency the law of the land. The legislature is equipped to discover a moral consensus and empowered to clothe that consensus with the force of law. The right of the state to sacrifice the lives of its citizens, or others, to the state's interests, whether or not such sacrifice is likely to secure the state's objectives, can be questioned; but the questioner's voice will echo hollowly

in the moral wilderness of modern America.

ARGUMENT

V

APPELLEE'S ARGUMENT ON THE QUESTION WHETHER DUE PROCESS PRECLUDES THE INTRODUCTION OF THE TESTIMONY OF AN ACCOMPLICE WHOSE TESTIMONY IS SUSPECT BY REASON OF INTEREST

To conceal the witness' interest would be despicable and violative of due process. See, State v. Taylor, 231 A.2d 212 (Supreme Court of New Jersey, 1967) To bar the testimony of all interested witnesses would place an insurmountable, purposeless stumbling block in the path to truth.

The appellant was protected by legislation and court rule from imposition by jury or prosecutor. 5 A.R.S. 21, § 13-136 reads as follows:

> "A conviction shall not be had on the testimony of an accomplice unless the accomplice is corroborated by other evidence which, in itself and without aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense. The corro-

boration is not sufficinet if it merely shows the commission of the offense or the circumstances thereof."

In this connection, see State v. Howard, 97 Ariz. 339, 400 P.2d 332.

Rule 29, Rules of the Supreme Court, 17 A.R.S. 112, reads as follows:

"The primary duty of the lawyer engaged in public prosecution is not to convict but to see that justice is done."

Due process can ask no more.

CONCLUSION

The order of the United States District Court denying petitioner's petition for a Writ of Habeas Corpus should be affirmed.

Respectfully submitted,

DARRELL F. SMITH
The Attorney General

CARL WAAG
Assistant Attorney General

STATE OF ARIZONA)
) ss.
County of Maricopa)

CARL WAAG, being first duly sworn upon oath, deposes and says:

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

_____
CARL WAAG

SUBSCRIBED AND SWORN to before me this _____day of December, 1967.

_____
Notary Public

My commission expires:

_____

COPY of foregoing Appellee's
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